The Decline of Legally Mandated Minority Representation

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The Supreme Court launched the practice, twenty years ago, of creating safe minority election districts. To comply with the Court's mandate, election districts throughout the United States were redrawn in the wake of the 1990 Census. Ironically, though, ever since the Court spawned this practice, it has been trying to cabin its own creation. In every single plenary decision since that initial moment of creation, the Court has cut back on the obligation to create safe minority districts, whether through constitutional limits on racial redistricting or though narrow readings of the scope of the Voting Rights Act.

Nonetheless, the politics of safe districting has retained a life of its own. Even as the Court has reduced the force of legal obligations, the political practice of safe districting remains much as it became in the early 1990s. Whether due to the increased political power of minority communities, the power of incumbent minority officeholders, or misunderstandings about the legal obligations the Voting Rights Act actually imposes today, safe minority districts where such districts can be created remains the norm.

In the first Voting Rights Act decision of the Roberts Court, the Court found part of Texas' recent congressional redistricting to violate the Act. As the first full decision on the merits to find the design of a congressional district to violate the Act, the Court's decision has been celebrated by many commentators as signaling a new Court commitment to the race-conscious design of safe election districts. This Article argues to the contrary. Properly understood, the Court's decision is yet another step in the Court's efforts to pull back from the implications of its initial intervention that revolutionized the design of election districts. Even so, this Article concludes, the political practice of safe districting will remain unaffected by the Court's most recent effort to limit it. If so, it will not be the first time a revolution has consumed its own creators.

I.

The first Voting Rights Act (VRA) decision of the Roberts Court, *League of United Latin American Citizens (LULAC) v. Perry*,[1] which

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[1] League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) [hereinafter LULAC].

addressed the Tom DeLay-inspired congressional redistricting of Texas, would seem initially to be a triumphant moment for the Act. For the first time in a full opinion on the merits since the critical 1982 amendments to the VRA, the Court held that a redistricting plan diluted minority voting power and hence violated Section 2 of the Act. The Court chose to endorse, from among all the legal attacks marshaled against the Texas plan, the Mexican-American Legal Defense Fund's (MALDEF) claim that the Texas plan diluted Hispanic voting power. The contrast with the Court's continued indecisive floundering over partisan gerrymandering claims—once again, *LULAC* exposed a Court unable to reach meaningful consensus on even whether partisan gerrymandering claims should be justiciable, let alone the standards by which such claims should be judged—makes this VRA holding all the more striking. In a decision that cuts across the conventional ideological lines that divide the Court, particularly in VRA cases, Justice Kennedy joined with Justices Stevens, Souter, Ginsburg, and Breyer to hold that, whatever else the Texas plan might have done, it violated the VRA. Thus, the MALDEF-inspired vision of the VRA triumphed over the DeLay-inspired gerrymander.

Understandable as it is to view this result as a victory for the VRA, such a view fundamentally misunderstands, I believe, the new Court's stance towards the Act. Far from a ringing endorsement of the law of minority vote dilution, *LULAC* reveals a Court increasingly troubled by—indeed, more and more resistant to—the very concept of minority vote dilution and the accompanying legal requirement of "safe minority districting." This resistance is not a radical new departure of the Roberts Court as much as an accentuation of principles that have been gathering force over the last fifteen years. The highwater mark of the Court's embrace of safe minority districting was the 1986 decision in *Thornburg v. Gingles*,[2] a divided decision issued in the immediate wake of Congress's 1982 amendments to the VRA. But not long after the ink was dry on *Gingles*—indeed, in every single districting case receiving plenary consideration since *Gingles*—the Court began searching for ways to pull back from the system that *Gingles* had wrought. First in the *Shaw* line of cases,[3] then in cases rejecting Section 2 and Section 5 claims on the merits,[4] a majority of the Court has continuously sought, without interruption, to cabin and confine safe minority

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[2] 478 U.S. 30 (1986).

[3] *See* Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

[4] *See* Georgia v. Ashcroft, 539 U.S. 461 (2003); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (1999); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997); Johnson v. DeGrandy, 512 U.S. 997 (1997); Holder v. Hall, 512 U.S. 874 (1994); Voinovich v. Quilter, 507 U.S. 146 (1993); Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).

districting to a narrower and narrower domain. Remarkably, until *LULAC*, the Court had not upheld a single Section 2 VRA claim in any case the Court has given plenary consideration since the moment *Gingles* was decided.[5]

LULAC itself engaged three distinct VRA claims. And even as the Court deployed the VRA to invalidate one district, the Court manifested additional and more destabilizing grounds for resistance to safe minority districting that will likely see fruition in the coming years. The immediate and most visible effect of *LULAC* was to preserve one Hispanic majority district; but the short-term, obviously intended, secondary effect was to lead lower courts to dismantle another Hispanic majority district that the DeLay gerrymander had created; and the more long-term effects of the views intimated in *LULAC* will likely be to cut back on the scope of the VRA in dimensions other than those formally presented in *LULAC*.

The net effect of *LULAC* will be to limit substantially the legal imperative to design safe minority election districts. With Justice Kennedy now in the driver's seat on these issues, replacing Justice O'Connor, those limits are likely to increase. The differences between Justices Kennedy and O'Connor in the voting-rights field were always subtle—more latent than fully articulated—but profound and evident to attentive readers.[6] Now that Justice Kennedy fully occupies the Court's center on these issues, *LULAC* suggests those differences will blossom into a commanding Court antipathy toward legally-mandated safe minority districting (as long as the current composition of the Court remains the same).

Properly understood, *LULAC*, read in conjunction with decisional trends over the last decade, portends Court resistance to such districting that will find expression in numerous legal doctrines and issues that arise under the VRA and the Constitution. To the extent the current Court addresses further VRA issues on the merits, this resistance will be, I believe, pervasive. It will affect the way the Roberts Court interprets the VRA itself, with revisions possible in the legal concepts core to vote-dilution theory, such as what

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[5] The Court has rejected constitutional challenges to race-conscious districting in certain circumstances. *See* Easley v. Cromartie, 532 U.S. 234 (2001); Lawyer v. Dep't of Justice, 521 U.S. 567 (1997); DeWitt v. Wilson, 515 U.S. 1170 (1995) (summary affirmance). The Court has also upheld the constitutionality of the procedural requirement of Section 5 preclearance as applied to one somewhat unusual context in Lopez v. Monterey County, 525 U.S. 266 (1999).

[6] *See Vera*, 517 U.S. at 956–86 (plurality opinion); *id.* at 990–95 (O'Connor, J., concurring); *id.* at 996–99 (Kennedy, J., concurring); *Miller*, 515 U.S. at 928–29 (O'Connor, J., concurring); *DeGrandy*, 512 U.S. at 1026–31 (Kennedy, J., concurring). *See also* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2505 n.6 (1997).

constitutes, in the legally relevant sense, "racially polarized voting."[7] Looming over all these issues, as well, is Congress's recent reauthorization in 2006 of Section 5 of the VRA and the question, likely to reach the Court in the next couple years, of whether Congress exceeded its constitutional power in reauthorizing the Act on the terms that Congress invoked. *LULAC* also suggests that, however the Court resolves that issue, it will certainly approach the question with demanding standards in mind.

To be sure, how much the Court continues unwinding the regime *Gingles* created will depend on how aggressively litigants are prepared to challenge that regime in the lower courts and how many opportunities the Court gets to revisit these questions. The Court does not address VRA issues often and might not have occasion to harvest the seeds planted in *LULAC* for a number of years. More importantly, perhaps, none of this suggests that we will suddenly see the demise of majority-black or Hispanic election districts. Most such districts already in existence will likely be maintained; where such districts arise or are sustained as a result of the ordinary pressures of political bargaining and deal making, they will continue to exist. At this point, the power of minority communities and the political forces surrounding safe minority districting might, as a practical matter, be more important than the legal ones. But with respect to the legal side of this dynamic, *LULAC* suggests that the era of aggressive legal mandates to create such districts is beginning to draw to a close.

II.

A single unifying theme courses through the several VRA issues the Texas case presented: the center of the Court believes that legally-required safe minority districting is in tension with basic ideals of democratic citizenship and should be required only when compelling circumstances justify it, such as when racial discrimination in the design of election districts is truly intentional ("intentional" is, of course, a freighted concept in this area, and I will address its meaning to the Court below). Though the VRA-aspect of *LULAC* that garnered the most immediate media and legal attention was the Court's use of the Act to invalidate District 23, the Court addressed three distinct VRA issues. On each, the Court acted to limit the scope of obligatory safe districting—even, perhaps surprisingly, on the issue upon which the Court relied to invalidate District 23 itself.

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[7] For a discussion of the meaning of "racially polarized voting" and its historical role in the development of VRA doctrine, see Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1833–50 (1992).

The most dramatic new principle concerning the VRA emerged in the Court's treatment not of District 23, which the Court invalidated, but of another district, District 25, which ran from Austin to the Rio Grande Valley.[8] This district was intentionally designed to be a Hispanic-majority congressional district. Because the Court did not formally hold District 25 illegal, some might be tempted to dismiss the Court's harsh condemnation of it as mere rhetorical flourish. I believe the opposite. Indeed, I would go so far as to speculate that Justice Kennedy's discomfort with the Austin-to-Rio Grande District 25 was the driving force behind the entire VRA thrust of the *LULAC* decision. To begin with, the very first question Justice Kennedy pressed at the oral argument reflected a concern—in a case the Court had studied for months in internal conferences before argument—that there was something wrong about the design of District 25.[9] Justice Kennedy was determined to thrust this district into the center of the argument (some districts have legal greatness thrust upon them).[10] In his aggressive questioning, Justice Kennedy flatly stated his view that Texas had used "race" in an "insulting way" in designing District 25.[11] From both the argument and final opinion, it appears clear that Justice Kennedy was determined not to let this Austin-Rio Grande district stand and certainly not to let the Court endorse districts designed in this way.

Justice Kennedy's concerns about *this* district, in fact, appear to have driven his invalidation of District 23, rather than the other way around. The Texas legislature had believed it necessary to create the Austin-Rio Grande district—or some other district like it—to offset its prior decision to carve up the previously Hispanic-majority District 23 (a decision the lower court had thought motivated by partisan politics, not by an aim to minimize Hispanic voting power).[12] If carving up such districts generated an imperative to create districts as offensive as District 25, Justice Kennedy seemed to believe, then the VRA regime had to be construed to cut off this pressure at its source. Holding the redesign of District 23 to violate the VRA was a means of doing exactly that—of eliminating the pressure to create "offensive" districts, in Justice Kennedy's view, such as District 25, which ran all the way from Austin to the Rio Grande.

Justice Kennedy found it easier to express the nature of his concerns about the Austin-Rio Grande district than to identify the precise legal cubbyhole into which those concerns could be fit. Had the central concern

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[8] *See* LULAC, 126 S. Ct. 2594, 2612–20 (2006).

[9] *See* Transcript of Oral Argument at 7, LULAC, 126 S. Ct. 2594 (2006) (Nos. 05-204, 05-254, 05-276, 05-439).

[10] *See id.*

[11] *Id.* at 9.

[12] *See LULAC*, 126 S. Ct. at 2613.

been that this district sprawled over too much territory, intentionally meandering to pick up enough pockets of Hispanic voters to constitute a majority, the Court, or at least Justice Kennedy, could have simply applied the *Shaw* doctrine and concluded District 25 was geographically not sufficiently compact to be constitutional. But Justice Kennedy had a bigger target in mind.[13]

What clearly bothered him, more than or in addition to the geographic sprawl of this district, was that it joined together poor rural Hispanics along the Texas border with the far more well-off Hispanics living in the urban, state capitol area of Austin. Invoking the lower court's findings of fact, Justice Kennedy noted that these different "Latino communities at the opposite ends of District 25 have divergent 'needs and interests,' owing to 'differences in socio-economic status, education, employment, health, and other characteristics.'"[14] Though these differences did not put District 25 at odds with the VRA for the lower court (even though that court was composed of at least some judges not known to be sympathetic to the VRA), for Justice Kennedy, the Austin and Rio Grande Hispanic communities lived in worlds far apart, not just physically, but culturally, economically, educationally, and in other ways—differences that were decisive. For Texas to lump these voters together, because they were Hispanic, was to engage in what Justice Kennedy viewed as a troubling and legally problematic "racial essentialism." In the key passage, he concluded that the racial essentialism he saw at work in the Austin-Rio Grande district was itself inconsistent with the VRA. In Justice Kennedy's words: "We do a disservice to these important

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[13] The oral argument suggested Justice Kennedy might have been prepared to hold District 25 unconstitutional on *Shaw* grounds, which would have extended *Shaw* by constitutionalizing a requirement that districts be culturally as well as geographically compact. *See supra* notes 9–11. But a majority of the Court rejected that view. Indeed, although the Chief Justice and Justices Scalia, Thomas, and Alito believed the race-conscious design of District 25 required that Texas justify that district's design under the standards of strict scrutiny, these Justices concluded that District 25 met that demanding standard and therefore survived *Shaw* review. *LULAC*, 126 S. Ct. at 2666–69 (Scalia, J., concurring in the judgment in part and dissenting in part). One of the further, insufficiently appreciated challenges *LULAC* poses for the future of the VRA is that this four-Justice concurrence, combined with Justice Kennedy's expressed views in prior cases, means that a majority of the Court now holds that intentional race-conscious districting always triggers strict scrutiny review. There had been considerable ambiguity on that issue before; indeed, my view is that a major divide between Justice O'Connor and other Justices supportive of *Shaw* had been that she believed, in effect, that strict scrutiny was triggered only when race-consciously designed districts deviated from traditional districting principles. Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2539–47 (1997).

[14] *LULAC*, 126 S. Ct. at 2613 (citations omitted).

goals [of the VRA] by failing to account for the differences between people of the same race."[15]

It is difficult to overstate how dramatically destabilizing this anti-essentialism principle is to conventional interpretation of the VRA. Defenders of the conventional view would argue that the Act does not essentialize racial identity, because the Act does not require minority voters to be districted together merely because they are minorities. The Act is triggered only when minority voters are "politically cohesive" (as well as when majority and minority voters exhibit polarized voting patterns), which means when minority voters actually vote together for the same candidates—meaning, for example, that Hispanic voters overwhelmingly vote for Hispanic candidates pitted against Anglo competitors.[16] The Hispanic voters in Austin and the Rio Grande Valley did share common voting preferences for Hispanic candidates.[17] But Justice Kennedy expressly rejected these common candidate preferences as sufficient to rebuff the essentializing concern. In his view, the VRA requires more than that "all the members of a racial group, added together, [can] control election outcomes."[18] Over and above common candidate preferences, the minority group must constitute a community of substantive interest, as reflected in socioeconomic and other commonalities, before the VRA is triggered.

The *Shaw* cases had held that race-conscious districting had to be limited, for constitutional reasons, to districts that were reasonably compact geographically. *LULAC* now adds to this the constraint that such districts must be, not only geographically compact, but ideologically coherent—and, most importantly, coherent in a deeper or broader sense than that minority voters share a preference for minority candidates pitted against majority ones. That is, districts must be "culturally" as well as geographically compact.[19]

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[15] *Id.* at 2618.

[16] Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

[17] *See LULAC*, 126 S. Ct. at 2652 (Roberts, C.J., concurring in part, concurring in the judgment, and dissenting in part) (noting lower-court findings that District 25 would function effectively as a Latino opportunity district).

[18] *Id.* at 2618.

[19] Dan Ortiz coined the label "culturally compact" to identify the Court's requirement, but Ortiz speculates that either geographic or cultural compactness is likely to be sufficient. Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 50 (2006), http://www.michiganlawreview.org/firstimpressions/vol105/ortiz.pdf (last visited Oct. 30, 2007). I view the matter differently and believe the two dimensions will interact, should the Court address the issue in later cases. The less culturally homogenous a minority community appears to be, the more demanding the Court might be about what constitutes a sufficiently compact district geographically.

What is the legal status of this principle? Put another way, did the Court actually hold the Austin-Rio Grande district unconstitutional or illegal under the VRA? The question leads to an amusing, perhaps revealing, Freudian slip in the Court's opinion. The opinion for the Court comes right up to the brink of holding this district itself to violate the VRA, but the Court blinked before jumping into that abyss. Technically, the Court does not quite formally hold District 25 illegal. But Justices Souter and Ginsburg, providing the crucial votes to give Justice Kennedy a majority of the Court, read Justice Kennedy's opinion to do just that—to hold that District 25 itself was illegal.[20] And they signed on to that result. One possibility as to why the Justices lacked a shared understanding of what they had actually decided is that drafts of Justice Kennedy's opinion had gone to the point of holding District 25 to violate the VRA, but that late in the day Justice Kennedy had backed away from this conclusion, while the concurring opinion had failed to keep up. Another possibility, the more Freudian one, is that Justices Souter and Ginsburg rightly heard the music being played in Justice Kennedy's opinion. Even if that opinion did not strike the note that would hold District 25 to violate the VRA, everything about Justice Kennedy's opinion sounds that tune.

From a legal perspective, the least Justice Kennedy's approach might mean—and this would still have dramatic consequences for the VRA—is that the Act is not violated even when there is racially polarized voting unless an election district can be created in which minority voters are not just a numerical majority, but in which the district is also geographically and culturally compact. States might not then have VRA obligations to create districts that, for example, bring together urban and rural minorities, or suburban and city ones, even when voting is racially polarized. Similarly, as the black middle class continues to expand, the class differences between these voters and those living in poorer inner-city or rural areas might also preclude a VRA obligation to unite these voters in a single district, even when voting is racially polarized. Racially polarized voting would remain necessary to prove a VRA violation, but not sufficient. "Naturally arising" safe minority districts would still remain required by the Act, such as districts in urban areas that have large minority populations geographically concentrated with similar socioeconomic characteristics—or, to put the point more in Justice Kennedy's terms, a State's failure to create such districts or its intentional dismantling of them where they "naturally arise" would be viewed as discrimination and a violation of the VRA. At a minimum, *LULAC*

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[20] *See LULAC*, 126 S. Ct. at 2647 (Souter, J., concurring in part and dissenting in part) ("I join Part III of the principal opinion, in which the Court holds that Plan 1374C's Districts 23 and 25 violate § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, in diluting minority voting strength.").

leaves no doubt that Section 2 of the VRA does not require, and should not be read to require, districts of the Austin-Rio Grande type (assuming the Justices who signed Justice Kennedy's opinion actually agree with all that it says).[21]

Alternatively, rather than Justice Kennedy's concerns flowing through a redefinition of what it means for a district to be "compact," it is easy to imagine these concerns being channeled into a redefinition of what the law considers racially polarized voting to be. Until now, that definition, going back to *Gingles*, has been that white and black (or Hispanic) voters consistently have different candidate preferences (typically tied to the race of the candidates), such that a white majority can consistently defeat the candidates minority voters prefer.[22] The simplicity of this "bivariate" conception of racially-polarized voting has long been a sore spot to critics of the *Gingles* approach. Going back to *Gingles* itself, for example, Justice O'Connor took issue with the Court's 5-4 decision on just this point, arguing that the *Gingles* understanding of polarized voting was overly simplistic and unfaithful to congressional purpose.[23] Recent cases have already incorporated other aspects of Justice O'Connor's *Gingles* concurrence into judicial doctrine.[24] No stretch of imagination is required, therefore, to

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[21] This Article treats Justice Kennedy's views as the ones that define the center of the current Court in closely contested VRA cases and that therefore control outcomes. This universally-shared assumption is more complicated regarding Justice Kennedy's view in *LULAC* that only culturally compact districts are required by the VRA because Chief Justice Roberts and Justice Alito expressly dissented from that position. *See LULAC*, 126 S. Ct. at 2652 (Roberts, C.J., concurring in part, concurring in the judgment, and dissenting in part). That suggests that Justice Kennedy might hold a more constricted view of the VRA than either of these other Justices. On the other hand, these two Justices went out of their way in *LULAC* to state the following: "It is a sordid business, this divvying us up by race." *Id.* at 2663. Given that statement, there is reason to wonder whether these two Justices will actually endorse a more expansive view of the VRA than Justice Kennedy in a case when such a difference would actually affect the outcome. At the same time, the Justices typically most supportive of expansive VRA interpretations, Justices Stevens, Souter, Ginsburg, and Breyer, joined Justice Kennedy's "cultural compactness" requirement, which would narrow the scope of the VRA. Whether those Justices, too, would adhere to such a view in another case is also uncertain. Given the uncertainty about what these various positions bode for the future, I continue to assume Justice Kennedy's views will be the controlling ones on the current Court, at least, and this Article thus rests on those views when it refers to the "center" of the Court or "the Court."

[22] *See* Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

[23] *See id.* at 83–105 (O'Connor, J., concurring).

[24] *See* Georgia v. Ashcroft, 539 U.S. 461 (2003). However, *Georgia v. Ashcroft* was recently overruled by the 2006 renewal of the Voting Rights Act, which mandates that preclearance should be denied to any voting law that "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or

envision the Court similarly adopting today a version of her approach to defining racial polarization. Some lower courts have found ways already to import more complexity than *Gingles* endorsed into the racial polarization analysis.[25] Of course, exactly what form a more complex, multivariate approach to defining racial polarization might take will remain a challenge for those seeking to supplant *Gingles*'s approach. But Justice Kennedy's expressed concerns in *LULAC* about the Act over-essentializing racial identity could certainly emerge in the form of Court reconsideration of when voting behavior is sufficiently troubling as to rise to the level of racial polarization that triggers the Act. *LULAC* might therefore signal increasing pressure in the coming years on the continuing vitality of the *Gingles* concept of racially-polarized voting.

Beyond redefining what Section 2 of the VRA *requires* of jurisdictions, *LULAC* might suggest the current Court's willingness to redefine "retrogression" under Section 5 of the Act. Thus, if covered jurisdictions were to dismantle non-culturally compact safe minority districts, perhaps *LULAC* portends that the Court will not consider such an act to be retrogressive in violation of Section 5. If there were no legal obligation to create such a district in the first place, as the Court now understands the Act, then undoing such a district might not be retrogressive. For jurisdictions outside the special coverage provisions of Section 5, Justice Kennedy's vision of cultural compactness might emerge in the form of constitutional challenges to earlier-drawn safe minority districts that are not culturally compact. It is not difficult to imagine that a Court that, in the *Shaw* cases, has already found non-geographically compact minority districts to violate ideals of democratic citizenship would also conclude that non-culturally compact minority districts do so as well. Given the principles Justice Kennedy expressed in *LULAC*, it is not difficult to imagine Justice Kennedy, in particular, reaching such a conclusion.

When *LULAC* was initially decided, some celebrated it as a major victory for the VRA. But those celebrations failed to hear, as other actors inevitably would, the larger music inspiring the Court's decision. The aftermath of *LULAC*, I believe, confirms this view. The three-judge lower-court, tasked with redrawing Texas' districts in light of *LULAC*, heard the message loud and clear. That court dismantled the Hispanic majority Austin-Rio Grande district that the DeLay gerrymanderers had believed necessary to

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color . . . to elect their preferred candidates of choice." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 580–81 (codified as amended at 42 U.S.C. § 1973c (2006)). For a more detailed discussion of the 2006 renewal of the Voting Rights Act, see *infra* notes 44–51 and accompanying text.

[25] *See, e.g.*, League of United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc).

create.[26] In the DeLay-inspired plan, that district had a Latino citizen voting-age population of 55%. In the lower-court redesign following *LULAC,* that population plummeted to 23.9%.[27] The byproduct of the successful VRA attack on one district was the decimation of a different, Hispanic-majority district. Even as *LULAC* used the VRA to preserve one Latino majority district, it destroyed another. In immediate political terms, this was, to be sure, a short-term victory for Latino voters; the reformed districts generated a net gain of one Latino-preferred member of Congress.[28] But in the longer term, the Court's legal assessment of District 25 will, if followed, significantly reduce legal obligations to create safe minority-election districts.

III.

I have focused thus far on what I consider the dominant VRA implications of *LULAC.* Those seeking such implications, I have suggested, should focus on the too-easily overlooked hostility the Court expressed toward the Austin-Rio Grande district, a hostility that spawned the dismantling on remand of that district. Moreover, there is an underlying unity of vision behind that aspect of *LULAC* and the two other contexts in which the Court addressed other VRA issues.

A second major VRA issue raised was whether minority plaintiffs could prevail in arguing that Section 2 required recognition of "coalitional district" claims. In the specific context at issue, the DeLay gerrymander had dismantled the district held for more than two decades by Martin Frost, the most powerful Anglo Democrat in the Texas congressional delegation. Frost's district—District 24—had been 49.8% Anglo, 25.7% African-American, and 20.8% Hispanic in citizen voting-age population.[29] The

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[26] *See* League of United Latin Am. Citizens v. Perry, 457 F. Supp. 2d 716 (E.D. Tex. 2006).

[27] In the first elections under the court-redrawn districts,, a Hispanic Democratic candidate strongly supported by Hispanic voters won in District 23, while an Anglo Democratic candidate won in District 25. *See Texas Republican Ousted as Last Seat Filled,* WASH. POST, Dec. 13, 2006, at A4; Office of United States Representative Ciro Rodriguez, http://rodriguez.house.gov/ (last visited Oct. 17, 2007); United States Representative Lloyd Doggett, http://www.house.gov/doggett/ (last visited Oct. 17, 2007). Congressman Doggett had represented District 25 before the Supreme Court's *LULAC* decision and continued to do so after the lower court on remand redrew his district. Whether Congressman Doggett is the "candidate of choice" of Hispanic voters in District 25 would require analysis of legal issues and voting data beyond the scope of this Article.

[28] *See Texas Republican Ousted as Last Seat Filled, supra* note 27.

[29] LULAC, 126 S. Ct. 2594, 2624 (2006).

DeLay plan "broke apart this racially diverse district, assigning its pieces into several other districts."[30] Plaintiffs argued that, even though African-American voters did not nominally control this district, they effectively controlled it and had consistently supported Frost as their candidate of choice. They noted that black voters made up approximately 64% of Democratic primary voters and hence nominally, as well as functionally, controlled the decisive primary election. Because the district was overwhelmingly Democratic in general elections, black-voter control of this primary was thus tantamount to black-voter control of the district.[31] Moreover, Frost's voting record had a 94% approval rating from the N.A.A.C.P.—the highest of any member in the Texas congressional delegation, including black and Hispanic congress members—and numerous black elected officials testified that Frost had strong support and was a candidate of choice in the black community.[32]

A "coalitional district" is one that functions as an effective ability-to-elect district for minority voters even though they do not constitute a formal majority of eligible voters.[33] A coalitional-district claim is that, just as the VRA requires or protects "safe" minority districts (that is, majority-minority districts) in some circumstances, it similarly protects coalitional districts when the latter effectively function in much the same way that safe districts do. On this view, there is nothing talismanic about whether minority voters constitute a formal majority or not; the only question that matters is how a district functions in fact, which turns on how different groups actually tend to vote. Functionally, districts in which black voters are a formal minority, but that operate in effect as a safe minority district, should have the same legal status as safe districts, given the policies and purposes of the VRA. In the context of Martin Frost's district, this coalitional district claim was plausible, for at least two reasons.

First, going into the 2000 round of districting, academic commentary had anticipated that this decade would see the rise of such claims, given the changing nature of voting patterns.[34] In *Georgia v. Ashcroft*, the Court had

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[30] *Id.*

[31] The ironic resonance of the Texas white-primary cases from the first half of the twentieth century will not be lost on those steeped in this history. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[32] *See LULAC*, 126 S. Ct. at 2650–51 (Souter, J. concurring in part and dissenting in part).

[33] *See* Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539–40 (2002).

[34] *See id.* at 1539–63. For the argument that black voters' control over Democratic primaries, in districts that reliably vote Democratic in general elections, should be taken into account in implementing the VRA, see generally Bernard Grofman et al., *Drawing*

embraced this commentary and adopted one version of these coalitional-district claims.[35] The Court had held that, to some extent, coalitional districts could be substituted for safe districts for purposes of Section 5 of the VRA. *LULAC* presented what might be thought the flip-side of the same coin: whether viable coalitional districts are required under Section 2 in the same contexts in which safe districts would otherwise be required. Second, the Department of Justice staff lawyers in the Voting Rights Section had concluded that the plaintiff's claim regarding the Frost district was correct.[36] Though higher-level policy officials in that Section rejected the staff's analysis, the disagreement in the Department of Justice signaled that the claim was plausible, as evidenced by the fact that at least two Justices on the Court also endorsed it.

Nonetheless, the Court rejected this claim. In the Court's view, there was no way to know whether Frost was really the candidate of choice of black voters in District 24 because no black candidate (or any other candidate) had ever challenged him in a primary.[37] Perhaps, the Court speculated, had a credible black opponent emerged, black voters would have gotten cold feet about Frost.[38] As a factual matter, if this kind of speculation is sufficient to

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Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C. L. REV. 1383 (2001).

[35] *See* Georgia v. Ashcroft, 539 U.S. 461, 483 (2003).

[36] *See* Dan Eggen, *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay Was Overruled*, WASH. POST, Dec. 2, 2005, at A1.

[37] *See LULAC*, 126 S. Ct. at 2624.

[38] Beneath the surface of this issue is an even more awkward one that courts seek to avoid: can a white candidate be considered, legally, a "candidate of choice" of a minority community for purposes of the VRA? That the answer should be no was argued forcefully by Justice White, who otherwise supported the majority in *Gingles*. Thornburg v. Gingles, 478 U.S. 30, 83 (1986) (White, J., concurring in part and dissenting in part). In his view, the concept of racial discrimination in the VRA applied only when white voters were voting against black candidates, not against white candidates the black community preferred. To hold that the Act applied in the latter context would turn the VRA into a form of protection for "interest-group politics rather than a rule hedging against racial discrimination." *Id.* This position was not briefed in *LULAC*. Had the Court been prepared to accept it, the challenge under the VRA to the dismantling of Frost's district would have been rejected at the threshold.

Though Justice White's position is understandable, there is nonetheless something undeniably disturbing about it. That the VRA is triggered only when black voters support black candidates and whites do not might be consistent with the logic and purpose of the Act, but it suggests a kind of racial essentialism of its own: can white candidates not be the genuine candidates of choice of black voters? Thus, Justice Brennan for a plurality rejected Justice White's position and held that the race of the candidate was not "pertinent" to Section 2 analysis. *Id.* at 68 (Brennan, J., majority opinion). Lower courts have fudged on this awkward question. Many label elections involving black candidates "the most probative" for VRA analysis without flatly holding that whites cannot ever be

defeat coalitional district claims on behalf of white candidates in this case, it will likely be so in almost any case, given the obvious strength of support Frost had among black voters. Perhaps if Frost were black, rather than white, the Court would have been more open to the VRA challenge to the dismantling of his district—but that would then force the Court to confront the uncomfortable issue of whether the VRA applies only, in effect, to black candidates. Perhaps if a candidate (white or black) in Frost's circumstances actually defeated, with overwhelming black voting support, a black primary opponent, the Court would be more receptive to a coalitional-district claim. To the extent coalitional-district claims remain viable, though, *LULAC* narrows the eye of the needle through which they will have to pass to succeed.

But even more revealing than the Court's willingness to cabin in VRA claims with speculative factual possibilities are the philosophical and legal reasons the Court expressed for rejecting this VRA challenge. To accept this kind of VRA claim would, in the Court's words, "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions."[39] The current Court, at least, is not likely to extend the concept of vote dilution to new domains. Coalitional-district claims are thus likely to function primarily as a one-way ratchet—recognized when invoked to *unwind* the "safe" minority districts created in the last decade, as in *Georgia v. Ashcroft*, but not when doing so would lock into place fixed percentages of minority voters otherwise. And all of this interpretive work takes place in the shadow of continuing constitutional concerns with what the Court views as the excessive racialization of election-district design.

So much for two of the three VRA issues *LULAC* engaged. The VRA requires neither coalitional districts in situations like that of Frost's district nor requires districts that are not culturally as well as geographically compact. But what of the third VRA claim in the case, the one the Court accepted that led it to invalidate one of the DeLay-inspired districts as a violation of Section 2? As noted at the outset, this is the first time in a Section 2 case on the merits that the Court, after plenary consideration, has held a single-member district to violate the Act. Surely the Court's deployment of Section 2 to invalidate this one district signals a Court moving toward greater acceptance of the VRA and the concept of minority vote dilution?

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candidates of choice. *See* Pildes, *supra* note 33 at 1519 n.22 (discussing the various views of the Justices and collecting lower court cases); *see also* Scott Yut, Comment, *Using Candidate Race to Define Minority-Preferred Candidates Under Section 2 of the Voting Rights Act*, 1995 U. CHI. LEGAL F. 571, 582–89 (discussing the various views of lower courts on whether race of the candidate matters).

[39] *LULAC*, 126 S. Ct. at 2625 (citing Georgia v. Ashcroft, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)).

Even here, I think not. Justice Kennedy's opinion devotes as much space and energy to explaining why District 25 is *not* required by the VRA as it devotes to explaining why District 23 *does* violate the Act. Justice Kennedy signals, in addition, that in the particular circumstances of the Texas case, he believes District 23 essentially involved a case of *intentional* racial discrimination. As the opinion puts it, the Court perceived the facts to "bear[] the mark of intentional discrimination that could give rise to an equal protection violation."[40] The key to the Court's finding of a VRA violation was its conclusion that, "[i]n essence the State took away the Latinos' opportunity *because* Latinos were about to exercise it."[41] For the future of VRA doctrine, whether the Court was right to perceive Texas as a case of intentional discrimination against Latino voters (the lower court viewed every aspect of the gerrymandering as about partisan political control) is beside the point. *LULAC* indicates only that the Court is prepared to find the VRA violated when a State *intentionally* manipulates election lines to deprive minority voters of the power they would otherwise have had the State simply left the lines intact.

Once again, then, as with every other aspect of the opinion, the Court's objection here is to the excessive racialization of the political process. Had Texas left District 23 alone, Latinos would have controlled it. Because, in the Court's perception, Texas could not tolerate that prospect, it dismantled District 23 instead. In doing so, the Court concluded, Texas violated the VRA. The Court's concept of intentional discrimination appears tied to an implicit baseline of a "naturally arising minority political community." When the State intentionally thwarts the political power that such a "naturally arising" community would otherwise have, the State has been excessively race conscious, discrimination has occurred, and the Act (as well as the Constitution) has been transgressed.[42]

If the Court is willing to invoke the VRA only when it spies intentional discrimination or actions akin to it, *LULAC* would hardly signal a new receptivity to the Act. Indeed, the Constitution already forbids intentional discrimination in election-district design[43]—and Justice Kennedy's language, quoted above, strongly suggests he would have found District 23

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[40] *Id.* at 2622.

[41] *Id.* (emphasis added).

[42] I view my reading here as consistent with, though cast in different terms than, Ellen Katz's subtle and creative commentary on the case. *See* Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1117, 1131 (2007). In Katz's view, *LULAC* indicates the Court is prepared to protect, through the VRA, minority communities when they are politically vibrant and competitive, but only then. I view the Court as prepared to protect "naturally arising" minority communities of voters. The two perspectives point in the same direction in *LULAC* and might well do so in many or most contexts.

[43] *See* Mobile v. Bolden, 446 U.S. 55 (1980).

unconstitutional for just this reason. Moreover, the *raison d'être* of Section 2 in its current form was precisely to extend the VRA from an intent to a results standard. Should the Court be moving toward "embracing" Section 2 by effectively limiting its reach to cases tantamount to intentional discrimination, proponents of the results standard—which means proponents of Section 2 in its current form—would hardly have cause to rejoice.

The unity of the legal, political, and moral vision of democracy and race underlying *LULAC* is now fully revealed. In each element of the three VRA aspects that the Court engaged, the majority sought to limit what it considered the excessive racialization of politics and the essentializing of racial identities in politics. In condemning District 25, the Court lambasted combining together Latinos of radically different socioeconomic status who lived hundreds of miles apart merely because they shared common preferences for Latino candidates. In rejecting the VRA coalitional-district challenge to Martin Frost's district, the Court rejected an application of the Act that, in its view, would have led to legal oversight of numerous districts throughout the country in the name of protecting the political power of minority voters. And even in invalidating District 23 under the VRA, the Court showed only that it is just as concerned about intentional discrimination—itself a form of turning politics into an excessively racialized matter—as it is about overly aggressive applications of the VRA or extensions of it into new domains.

The temptation to view *LULAC* as an endorsement of an aggressive approach to the VRA is understandable. Not only did the Court invoke Section 2 for the first time to invalidate the dismantling of a congressional district, but this result was the product of Justice Kennedy joining the four Justices (Stevens, Souter, Ginsburg, and Breyer) who are routinely most supportive of aggressive interpretations of the VRA. But such a view requires concluding that Justice Kennedy has suddenly abandoned his consistent, frequent, and strongly expressed skepticism about the state-mandated use of race in districting the VRA requires.

I view *LULAC* in precisely the opposite way. Any "victory" for the VRA here is a Pyrrhic one. The opinion takes away more than it gives, from the perspective of those seeking aggressive application of the Act. Every aspect of Justice Kennedy's controlling vote is consistent with his general, longstanding resistance to what he views as the excessive racialization of politics, whether that excessiveness comes about through state actors intentionally manipulating racial identities to frustrate naturally emerging minority communities or through aggressive applications of the VRA that would "essentialize" racial identities by too readily treating all black or Hispanic voters as if they share common interests. Because the results test under Section 2 of the Act inherently requires the kind of racial essentialism Justice Kennedy finds offensive, *LULAC* suggests the "Court"—in the form

of Justice Kennedy's controlling view—remains on a collision course with the essential thrust of certain of the Act's core features.

IV.

At the same time the Court was handing *LULAC* down, two major events in the political arena occurred that might affect the Court's approach to the VRA. The most important was Congress' decision to authorize renewal of Section 5 of the Act for another 25 years.[44] As part of this action, Congress also took issue with *Georgia v. Ashcroft*, one of the major milestones in the Court's drumbeat of retreat over the last 15 years from the most aggressive interpretation of vote dilution. With Congress reentering the VRA lists for the first time in 25 years, and with its seeming repudiation of the Court's retreat, will the Court shift gears, return to the strong view of vote dilution from the *Gingles* era, and now embrace a view of the Act that entails aggressive legal mandates for minority representation—whether under Section 5 of the Act, Section 2, or both?

For at least three reasons, it is not obvious that Congress' action will push the Court off the path the Court has been taking. First, though Congress did intend to "reject" *Georgia v. Ashcroft*, there is a great deal of ambiguity and uncertainty about what Congress understood the renewed Act to mean. As Professor Persily points out, in the most comprehensive academic analysis of the renewal process, this ambiguity infects both the text of the renewed provisions and the purposes that inform the text.[45] Congress left the new statutory provision "undefined," as Professor Persily puts it.[46] This kind of ambiguity and uncertainty leaves the Court considerable latitude, perhaps, to continue to import its own vision of the Act into its interpretation of these provisions. Second, and more concretely, the Court will find a remarkable debate over these issues played out in the Senate Judiciary Committee report,[47] where the relevant issue was focused on most directly—a debate a willing Court could take to confirm its own, more narrow view of the Act even as Congress challenged one of the Court's major, recent decisions. Although the Act passed the Senate unanimously (almost always a sure sign that difficult issues have been papered over and avoided), the Senate

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[44] *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, *supra* note 24.

[45] *See* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. (forthcoming 2007), *available at* http://ssrn.com/abstract=989008. Persily devotes 24 pages to working through the various possibilities of what Congress might have meant in its spare and cryptic overruling of *Georgia v. Ashcroft*.

[46] *Id.* (manuscript at 145).

[47] S. DOC. NO. 109-295 at 1–64 (2006).

Committee Report revealed deep conflict, with a partisan cast, over what the renewed Act actually meant.[48]

The Report stated that, in overruling *Georgia v. Ashcroft*, the renewed provisions nonetheless only protected "naturally occurring majority-minority districts."[49] As the numerous references to this concept in the Report make clear, the concept of a "naturally occurring majority-minority district" is the Report's touchstone for determining when illegal vote dilution occurs under Section 5 of the Act, at least to the committee majority (all Republican on this issue). By "naturally occurring," the Report singled out those districts "that would be created if legitimate, neutral principles of drawing district boundaries, such as attention to county and municipal political borders, were combined with the existence of a large and compact minority population to draw a district in which minorities constitute a majority."[50] This understanding of vote dilution, though, is not only consistent with that of Justice Kennedy in *LULAC*: it is, as I have shown above, precisely the understanding of vote dilution that Justice Kennedy embraced in *LULAC before* Congress had acted. To the extent he relies on the Senate Report, then, Justice Kennedy need not see Congress's action as a major challenge to his prior views.[51] The destruction of a majority-minority district that would otherwise "naturally occur" can be seen as intentional racial discrimination—just as Justice Kennedy saw it in *LULAC*. This is tantamount to applying the Act only when fair application of traditional districting principles would *likely* result in creation of a safe minority district; *Gingles*, in contrast, has been understood (particularly in the lower courts) as requiring such a district whenever voting is polarized and traditional districting principles *could* result in creation of a safe minority district.

The third reason the Court's retreat from legally-mandated minority representation might not be slowed by Congress's action in renewing Section 5 of the VRA is the starkest. Justice Kennedy has intimated that, in his view at least, *Georgia v. Ashcroft* is not just a statutory decision, but one

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[48] As Persily puts it, "[t]he evolution of the Senate Judiciary Committee Report offers the best window into the fragility of the political compromise that undergirds the new VRA and the basic disagreement that exists concerning its key provision." Persily, *supra* note 45 (manuscript at 113). Thus, in their "additional views" included with the Report, the Democratic minority on the Committee revealed the depths of this internal struggle: "We object and do not subscribe to this Committee Report . . . [which] has become a very different document than the draft Report circulated by the Chairman on July 24, 2006." S. DOC., *supra* note 47, at 54–55.

[49] S. DOC., *supra* note 47, at 18, 19, 21, 24.

[50] S. DOC., *supra* note 47, at 21.

[51] The appropriate relative weight statutory text, legislative history, and the context of enactment should bear in statutory interpretation remains, of course, a matter of ongoing disagreement within the Supreme Court.

compelled by the shadow of constitutional considerations. Indeed, he suggested so in *LULAC* itself, where he indicated his view that *Georgia v. Ashcroft* represents the principle that "serious constitutional questions" would be raised were the Act to infuse race into the districting process excessively without sufficient justification[52]—which would have been the case, in his view, had the Court come to a contrary result in that case. Of course, Congress did come to that contrary result when it rejected the Court's *Georgia v. Ashcroft* decision. Thus, it is possible that Justice Kennedy and the Court would conclude that constitutional considerations require the Court to give a narrow reading to Congress's rejection of *Georgia v. Ashcroft*—or, even more dramatically, that the Court could hold this provision in the renewed VRA unconstitutional altogether.

The second event in the political domain is a series of highly visible national election events that might bolster the Court's resistance to legally-mandated minority representation. In the fall 2006 elections, a black Democratic candidate, Harold Ford, Jr., narrowly lost an extremely competitive Senate race in the former Confederacy state of Tennessee. In the border state of Maryland, another black Senate candidate, this one a Republican, Michael S. Steele, also lost a close contest. But Tennessee has been a consistently Republican state in recent national elections and Maryland a consistently Democratic one. Ford and Steele, black Democrat and Republican, seemed to have fared as well as white national candidates do today in their states (the black voting-age populations of Tennessee and Maryland are, respectively, 14.8% and 26.3%).[53] Though there were allegations that one particularly salacious television advertisement in Tennessee carried an implicit racial appeal, Ford ran better than did any white Democrat for the Senate or Presidency in the 2000s, with the exception of Al Gore, who ran almost as well in his home state in 2000 as Ford did in 2006.[54] Similarly, Steele did better than any white Republican in Maryland

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[52] LULAC, 126 S. Ct. 2594, 2625 (2006) (citing Georgia v. Ashcroft, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)).

[53] *See* U.S. Census Bureau, TOTAL–VOTING-AGE POPULATION AND CITIZEN VOTING-AGE POPULATION BY SEX, FOR THE UNITED STATES AND STATES: 2000 (2004), http://www.census.gov/population/cen2000/phc-t31/tab01-01.pdf; US. Census Bureau, BLACK OR AFRICAN AMERICAN ALONE–VOTING-AGE POPULATION AND CITIZEN VOTING-AGE POPULATION BY SEX, FOR THE UNITED STATES AND STATES: 2000 (2004), http://www.census.gov/population/cen2000/phc-t31/tab01-03.pdf.

[54] The relevant Democratic vote percentages are: 32.2% (2000 Senate); 44.3% (2002 Senate); 47.3% (2000 Presidential election); 42.5% (2004 Presidential election). Ford received 48% in the open-seat 2006 contest. The 2002 Senate race was also an open-seat contest. *See* TENN. DEP'T OF STATE, NOVEMBER 2, 2004 GENERAL ELECTION UNITED STATES PRESIDENT: BY COUNTY TOTALS (2004), http://www.state.tn.us/sos/election/results/2004-11/prescounty.pdf; TENN. DEP'T OF STATE, NOVEMBER 7, 2000 GENERAL

has for Senate or the Presidency since 1998.[55] Even more visible and dramatic, of course, is the enormous attention and enthusiasm for Senator Barack Obama's presidential campaign, whatever the final outcome might be.

These examples—probably the most remarkable moment, taken as whole, in American history for black Senate and Presidential candidates—might lead the center of the Court to believe that strong, credible black candidates are reaching the point at which they can draw strong support from white voters, even in Southern and border states (note that Obama did well in his contested Democratic Senate primary even in southern Illinois, itself much like the South). Though anecdotal evidence of this sort is not as reliable as more comprehensive empirical studies across numerous elections and jurisdictions, Justices on the Court might well be more influenced by these high-profile national events than by statistical studies the Justices are less likely to read. Based on these events, the center of the Court might conclude there is even less need than 15 years ago, when the Court first began to cut back on legally-mandated minority representation, to insist on the creation of safe minority districting as the only means by which black candidates are likely to get elected.

V.

The story of the relationship between law and practical politics in the context of the rise of "safe" minority districting over the last generation is a fascinating one that has not yet been adequately told. Even the legal side of this relationship has more internal complexity than is typically recognized.

With respect to the law, those of us who work on these issues academically have taken the Court's 1986 decision in *Gingles* for granted.

ELECTION OFFICIAL RESULTS (2000), http://www.state.tn.us/sos/election/results/2000 11/us-state.pdf; TENN. DEP'T OF STATE, NOVEMBER 5, 2002 GENERAL ELECTION UNITED STATES SENATE: BY COUNTY TOTALS (2002), http://www.state.tn.us/sos/election/results/2002-11/us-senate.pdf.

[55] The relevant Republican vote percentages are: 29% (1998 Senate); 37% (2000 Senate); 33.7% (2004 Senate); 40% (2000 Presidential election); 43% (2004 Presidential election). Steele received 44.2% in his open-seat contest in 2006. None of these other Senate races involved open seats. *See* MD. STATE BD. OF ELECTIONS, 2004 PRESIDENTIAL GENERAL ELECTION OFFICIAL RESULTS (2004), http://www.elections.state.md.us/elections/2004/general/001.html; MD. STATE BD. OF ELECTIONS, 2000 PRESIDENTIAL GENERAL ELECTION OFFICIAL RESULTS, http://www.elections.state.md.us/elections/2000/results/pregapre.print.html; MD. STATE BD. OF ELECTIONS, 2004 PRESIDENTIAL GENERAL ELECTION OFFICIAL RESULTS: U.S. SENATOR (2004), http://www.elections.state.md.us/elections/2004/general/007.html; MD. STATE BD. OF ELECTIONS, 1998 GUBERNATORIAL GENERAL ELECTION RESULTS: U.S. SENATE (2000), http://www.elections.state.md.us/elections/1998/ results_1998/gasen.html.

That is, we have long thought that *Gingles* provided the basic framework for giving content to the concept of vote dilution and defining when the obligation arose to create "safe minority districts." When the Court first cut back a bit on *Gingles*, these decisions seemed to many like exceptions or retrenchments from the fundamental framework *Gingles* had put in place.

But in hindsight, and with many years of post-*Gingles* experience now in place, this picture must be recast. As a matter of Supreme Court doctrine, *Gingles* now looks more like the last gasp of an older, dying era than the framework for a new one. The Court briefly gave birth to an aggressive requirement of safe minority districting in the mid-1980s, toward the end of the era when Justices Brennan and Marshall still sat on the Court. *Gingles* itself was a 5-4 decision. It addressed the problem of multi-member election systems, not the single-member districting plans that characterize congressional districts and that dominated litigation starting in the 1990s. And ever since the creation of *Gingles*, the Court has been seeking ways to cabin its offspring. The Court has never extended *Gingles* or expanded on it. Instead, it has cut back on the implications of *Gingles* at every opportunity. In retrospect, it now seems clear that the half-life of majority support within the Court for *Gingles* was extremely brief.

LULAC is of a piece with this larger pattern. Far from being a triumphant moment for the *Gingles* vision of the VRA, *LULAC* has more in common with *Shaw v. Reno* and *Georgia v. Ashcroft*. Through various doctrines, the Court is groping for what seems to be a way to confine the concept of minority vote dilution to cases the Court views as ones of truly intentional state discrimination. The touchstone appears to be the concept of a "naturally arising" minority district, one that exists or would exist due to the geographic concentration of minority voters whose proximity also reflects common socioeconomic and other interests.

The judicial side of this story is internally more complex, however, because the Supreme Court returns to these issues only episodically. Just as academic commentators took the *Gingles* framework as given for much of the last 20 years, most lower courts did so as well. In the years since *Gingles*, most lower courts continued to apply *Gingles* on its own terms, limiting *Gingles* only in those specific areas where the Court expressly had done so. Though strong support for *Gingles* in the Court itself appears, in hindsight, to have lasted only for a brief moment, litigants did not test the various premises of *Gingles*, and the Court was not pressed to revisit any of these premises. Legally, the system ran on a form of automatic pilot, in which *Gingles* continued to control the basic instrumentation.

The relationship of the law to the political practices in this area is even more intriguing than that of the Supreme Court to the lower courts. *Gingles*, in 1986, was an interpretation of Congress's 1982 amendments to the VRA. But the Court was far out ahead of Congress in this area. Few observers

believe that the 1982 Congress would have enacted the law that emerged a few years later from the Court's interpretation in *Gingles*. The Court's decision might well have been a defensible means of creating a judicially-administrable system out of the vague and responsibility-avoiding instructions Congress had given. But given the nature of the legislative issues in 1982, it is difficult to conclude that Congress would have embraced the safe-districting mandate in as routine and mechanical a form as *Gingles* required. Fueled by what *Gingles* required and perceptions of what *Gingles* required (perceptions among political actors, lawyers, and lower court judges), the 1990s saw an explosion of safe minority election districts throughout the country.[56] This explosion occurred more dramatically than Congress likely had imagined and more systematically than the rising political power of minority communities at that time would have generated absent the fact and perception of this legal obligation. As the Court saw the consequences of its *Gingles* decision, particularly as the membership of the Court changed, it sought to pull back from the consequences of what *Gingles* had wrought. Wittingly or not, the Court had precipitated a revolution in the design of election districts.

The center of the Court has been seeking ever since to put the genie it unleashed back in a bottle. But by now it is mostly too late. The era of legally-mandated minority representation may continue to wane.[57] To the extent these issues come to the Court, it might seek to continue to limit *Gingles* or even revisit some of that decision's core principles. Nonetheless, the political practices of safe districting have now outrun the Court. Short of an unlikely constitutional revolution in which the Court would hold routine instances of safe minority districting to violate the Constitution, issues concerning such districting are now likely to be more a matter of politics than

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[56] *See* Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1364 (1995).

[57] Throughout this Article, I am focusing on legal obligations for the creation of safe minority districts in the context of single-member districting plans, such as those used to elect members of Congress and most state legislators. At the local government level (and for some state legislative seats), there will continue to be litigation over at-large and multi-member election systems. *Gingles* itself involved a challenge to multi-member election districts. There is much less reason to conclude that the Court is reluctant about continuing to apply the VRA to these contexts—the ones that formed the original context of *Gingles* itself—than to the design of individual single-member districts within a single-member districting plan. Though such claims were brought largely on behalf of African-American voters at the time of *Gingles*, today they are often brought on behalf of Hispanic voters, as evidenced in some of the most recent challenges to at-large and multi-member districting systems. *See, e.g.*, United States v. Osceola County, 2006 U.S. Dist. LEXIS 75935 (M.D. Fla.) (Oct. 18, 2006) (holding at-large elections violated VRA rights of Hispanic voters); Complaint, United States v. Vill. of Port Chester, No. 06 Civ. 15173 (S.D.N.Y. Dec 15., 2006) (Department of Justice complaint alleging the same).

legal mandates. With minority communities increasingly integrated into politics, and with some of these communities forming core constituencies of the major parties or constituencies for which the two parties are aggressively competing, safe minority districts will arise and be sustained through the give and take of routine (and routinely ugly) redistricting politics. Moreover, the safe districts created in the 1990s as a result of legal mandates have generated and will continue to generate powerful interests and constituencies that support the maintenance of these districts. Finally, those in control of the redistricting process, including politicians and their legal advisors, are highly risk-averse when it comes to potential legal challenges to plans; to keep control of the plan and the political deals it embodies, redistricters seek to avoid giving potential litigants and courts any justification for overturning a plan.[58] The safest way to reduce risk is to create safe minority districts when they can be designed in ways that are consistent with "traditional districting principles" and that resemble the design of other districts, whatever the precise content of the legal obligation to draw such districts might or might not be.

When the Court began cutting back on legally-mandated safe districts in the 1990s with the *Shaw* decision, critics complained that minority representation would be decimated; in a famously overheated line, prominent figures asserted that the *Shaw* decision was a form of "ethnic cleansing"[59] and predicted that the Congressional Black Caucus (CBC) would soon have to start meeting "in the backseat of a taxicab."[60] Subsequent years have revealed just how exaggerated these fears were, for the CBC today is more powerful than ever. The Court appears committed to continuing to protect against interferences with "naturally occurring majority-minority districts." Beyond that context, the Court might resist mandating such districts in other circumstances. But the politics of safe districting now has a life and dynamic of its own, one the Court is likely to affect, if at all, only at the distant margins. If so, it will not be the first time a revolution has consumed its creators.

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[58] *See* Bruce E. Cain & Karin MacDonald, *Voting Rights Act Enforcement: Navigating Between High and Low Expectations*, *in* THE FUTURE OF THE VOTING RIGHTS ACT 125, 126–30 (David L. Epstein et. al. eds. 2006).

[59] David G. Savage, Despite Redistricting Dispute, Black Lawmakers Win Reelection, L.A. TIMES, Nov. 9, 1996, at A10 (quoting Jesse Jackson).

[60] *Id.* (quoting an attorney for the NAACP Legal Defense Fund).